This is an excerpt from Ground Rules: Your Handbook to Utah Land Use Regulation. The entire book can be purchased at Amazon.com.

How Projects are Reviewed and Decisions are Made

CHAPTER 3

Before understanding the process of approval, one must grasp the difference between local *legislative* decisions and local *administrative* or *quasi-judicial* decisions[1]. The Utah courts have pounded on this issue in a handful of cases over the past few decades in a whole-hearted effort to help all those in the land use arena understand it.[2]

Basically, the concept can be stated simply.

Legislative Actions

A legislative act is a decision made by a public vote of the city or town council or the county commission or council that results in (1) a new ordinance, (2) an amendment to an existing ordinance, (3) adoption of the general plan, (4) an amendment to the general plan, (5) amendment to the zoning map or (6) the creation of an official policy, rule, or code of general community-wide application. Only a body of elected government officials can make legislative land use decisions and only after receiving a recommendation on the proposed action from the planning commission.

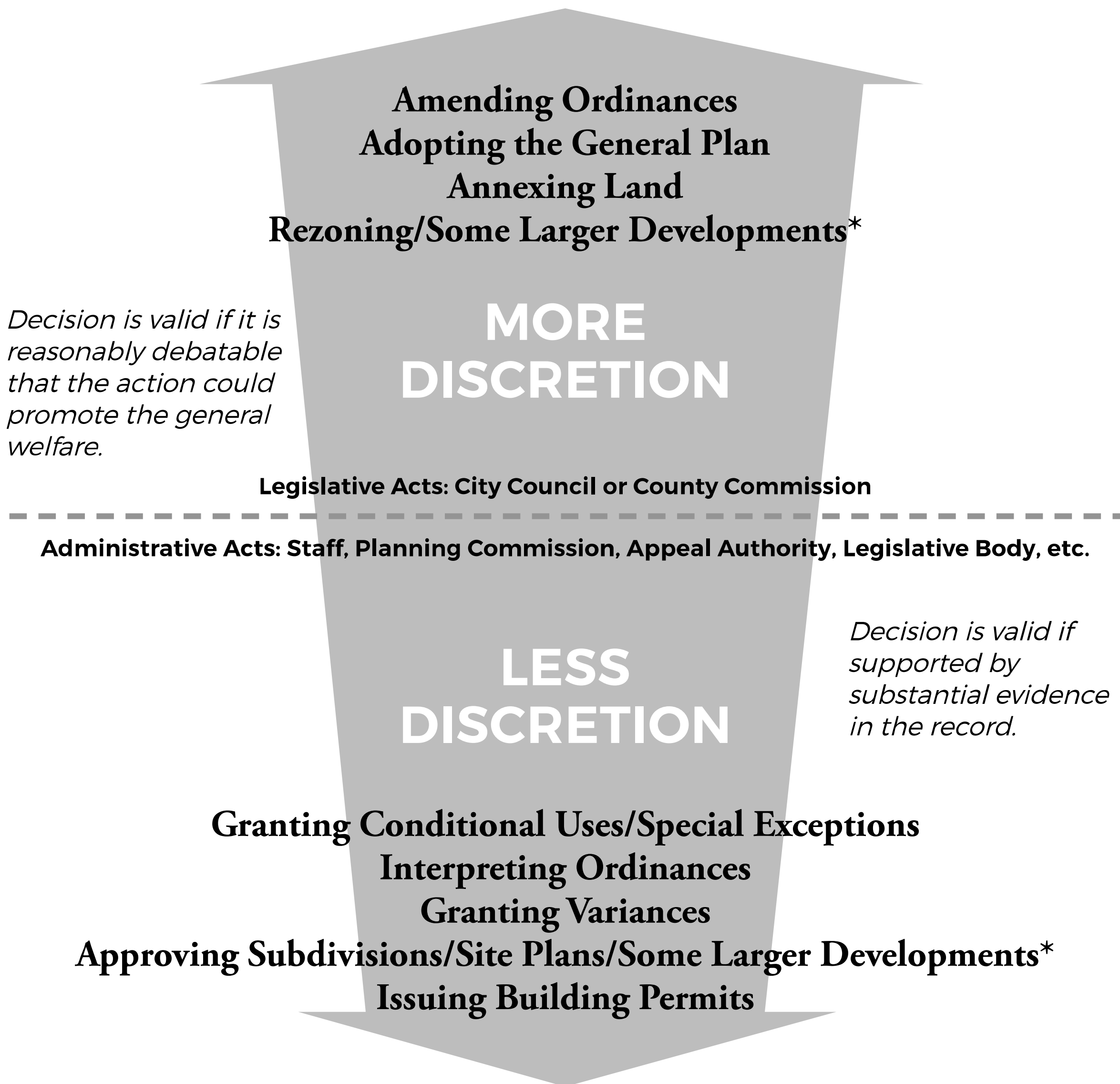
These actions by local legislators are afforded great deference by the courts. The local city council or county commission has the discretion to adopt any plan, ordinance, rule, or standard as a legislative act unless it can be proven that their decision does not advance the general purpose of the state Land Use, Development, and Management Act or violates state or federal law. So long as it is "reasonably debatable" that the legislative action advances the purposes of the Act and does not violate other state or federal statutes and constitutions, it will be upheld.[3]

Administrative Actions

When the council, commission, planning commission, board of adjustment, appeals authority, or their staff administers and enforces a legislatively adopted plan, ordinance, rule, or standard, however, their decisions are not legislative acts. They are administrative or quasi-judicial acts, and they are not entitled to the same deference

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

How Much Flexibility Does the Government Have?



** A larger development and an associated development agreement may be either administrative or legislative, depending on whether broad issues of public policy are involved.*

NOTE: This is a gross oversimplification of a complex subject, for purposes of illustration and discussion only. Much of the discretion afforded a local government entity is defined by the ordinances of that entity, which can vary from municipality to municipality.

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

as legislative acts. These non-legislative decisions must be supported by *substantial evidence* that must be included in a formal *record* of each decision.[4] All actions and decisions made by staff, local executives, boards of adjustment, appeals boards, and hearing officers are administrative or quasi-judicial acts.

Administrative Actions by a Legislative Body

Many decisions by legislative bodies are not legislative at all, since they do not result in an ordinance, general plan, code, rule or policy. Decisions involving individual subdivision approvals, variances, conditional use permits, and site plans are rarely legislative.[5] They are almost always administrative and thus must be supported by substantial evidence in the record if they are to be legal and enforceable.

What is *Legislative* Discretion?

Case Law - Harmon's v. Draper

In a case involving a local legislative decision, the company that owns Harmon's grocery stores made application to the City of Draper for permission to build one of their prototype stores at 11400 South and 700 East. The area was shown on the general plan as commercial but had been assigned a residential zone on an interim basis, an assignment which would not allow the intensive use Harmon's proposed. Although the planning staff recommended approval and the planning commission also jumped on the bandwagon, the application hit the skids before the city council.

A group of vocal neighbors, predictably concerned about the impact of a 24-hour grocery store on their rear property lines, appeared before the city council and argued against approval. In this case, the developer had done extensive studies and had its administrative "ducks in a row." The application included traffic studies, storm water management plans, landscaping schemes, and parking design. The architecture of the building was shown in detail and financial analysis was done to show what a sales tax machine the proposed businesses would be for the City of Draper.

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

A zoning request to allow this Harmon's grocery store was first denied, then approved, by the Draper City Council. It was within the discretion of the council to agree to change the zoning or not. The area zoning map and an aerial photograph of the site are found on page 48.

All this was inadequate in meeting the concerns of the neighbors, however, and the city council agreed with them that the proposed use was not compatible with nearby neighborhoods. The rezone was denied, although there was clearly plenty of evidence offered upon which the council could have based an approval.

Harmon's took the matter to district court, claiming that the city council had abused its discretion and that there were insufficient rea sons to support a denial. After losing in the trial court, Harmon's appealed to the Utah Court of Appeals.

In a decision published in 2000, the court upheld the city's action.[6] Speaking unequivocally so as to not be misunderstood, the court said:

> Harmon's presented ample information to the city council that would have justified Harmon's requested change in zoning classification. However, in attacking the city's action, Harmon's burden was not to show that the city council had no reason to deny Harmon's application . . . Rather the burden was on Harmon's to show that the city's decision to preserve the status quo . . . *could not promote the general welfare.*

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

> Although Harmon's presented evidence to support the position that the proposed zone was reasonable, the city council, upon the record before it, could have reasonably concluded that the [existing] use of the property for residential purposes consistent with the current zoning status was entirely appropriate.[7]

The court also held that the public clamor that occurred at the hearing could be appropriately cited as a factor in the council's decision. Although the comments by neighbors were not based on specific facts or substantial evidence, legislative decisions need not be based on that kind of analysis. The court stated:

> "It is a legislative body's prerogative to determine public policy, a judicial body's job to interpret the policy, and an administrative body's job to enforce the policy. Establishing zoning classifications reflects a legislative policy decision with which courts will not interfere except in the most extreme cases. Indeed, we have found no Utah case,

Some of the attractive homes that are near the Harmon's store. The Draper City Council had to grapple with the decision of what kind of commercial uses are compatible with Draper residential areas and how adjoining uses can be buffered.

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

> nor a case from any other jurisdiction, in which a zoning classification was reversed on grounds that it was arbitrary and capricious."[8]

Validating the council's reliance on the concerns of neighbors, the court said,

> "In performing their duty it is both their privilege and obligation to take into consideration their own knowledge of such matters and also to gather available pertinent information from all possible sources (emphasis added) and give consideration to it in making their determination."[9]

The bottom line with legislative decisions is that, as the court stated, it is nearly impossible to challenge them. Absent racial prejudice or some other poisonous motive, legislative decisions are upheld by the courts.[10]

It is noteworthy that, despite its failure in the courts, Harmon's did build the store it originally proposed. It is in operation today at 11400 South and 700 East in Draper. How could this be after the neighbors and the city prevailed at the Court of Appeals?

Remember the standard—the principle is neither that developers always lose nor that neighbors always win. The standard is that the legislative body virtually always wins on legislative questions. In a later city council vote (after an intervening election where new council members were elected and before a council composed of some new faces), Harmon's won the zoning battle and received permission to build, albeit for an amended plan that addressed some neighborhood concerns. Had the neighbors challenged that second decision, they would have faced the same problem Harmon's faced originally—it is almost impossible to fight a local legislative decision. Just as Harmon's lost in its attempt to fight city hall, the neighbors also would have lost if they had challenged the council. Local legislative land use decisions can rarely be successfully challenged in court.

This standard is not unique to Utah. Indeed, Justice Sutherland laid down the language in that 1926 zoning case before the U.S. Supreme Court discussed in Chapter 1, which stated that local zoning decisions need only be "fairly debatable" in order to be upheld.[11]

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

Legislative decisions include the following made by the legislative body, which the state code refers to as imposing "land use regulations"[12]:

- Adopting or amending the general plan.
- Adopting or amending the zoning map.
- Adopting or amending the text of the land use ordinances, including the procedures and standards that relate generally to subdivisions, conditional uses, and other land use applications.
- Setting uniform, printed development standards, codes, and regulations that are applicable generally to land use within the city, as opposed to a specific development approval for one isolated application.

What is *Administrative* Discretion?

Case Law — Wadsworth v. West Jordan

As a contrast to the way legislative decisions are reviewed by the courts, consider the matter of Ralph L. Wadsworth Construction, Inc. versus West Jordan City.[13]

Wadsworth, as the property owner, appeared before the West Jordan Planning Commission to ask for a conditional use permit to allow outdoor storage at their proposed construction yard and office in an industrial park. The land was already zoned M-1, which permits light manufacturing and construction services. West Jordan zoning ordinances defined "open storage" as a conditional use requiring approval by the West Jordan Planning Commission.[14]

When a land use board or commission reviews a conditional use permit application it is involved in an administrative act. In this case, since the land was already zoned for outdoor storage, the issue involved limited discretion. The planning commission was only empowered to impose reasonable conditions governing the manner in which materials are to be stored outdoors. The previous legislative decision to designate outdoor storage as a conditional use allowed in the zone already settled the issue of whether or not outdoor storage was appropriate and acceptable in the zone.

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

The construction yard behind this building was the focus of a battle over conditional uses in West Jordan.

The commission could therefore only prohibit outdoor storage outright in this administrative context if it could show by substantial evidence on the record, (as considered under the standards set forth in the zoning ordinance) that the negative aspects of outdoor storage on the particular parcel involved could not be mitigated because of the special characteristics of the parcel owned by Wadsworth.[15]

When the planning commission met to consider Wadsworth's request, representatives of neighboring property owners, including representatives of Dannon Yogurt, appeared before it and expressed concern that open storage would "induce rodent traffic" and create dust problems.[16] After delaying a decision for a few weeks so the staff could review the matter, the commission denied the application. Wadsworth appealed to the city council, which met on the matter a few months later. Again, the neighbors appeared and protested. Again, the conditional use permit application was denied.

As the basis for the denial, the council adopted these findings:

1. The city has made a significant investment in bringing Dannon to the area and the attributes which attracted Dannon to the area need to be maintained. Outdoor storage is detrimental to the area, making the area less attractive and injurious to the goals of the city.

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

The attractive industrial campus of Dannon Yogurt is near the site of a battle over outdoor storage. The more upscale industrial users in the area fought a construction company's request for less attractive uses in the industrial zone.

2. Outdoor storage may be considered to be a nuisance to neighboring property owners.
3. Outdoor storage would encompass the majority of the parcel. The area and intensity of outdoor storage are much different than that of neighboring property owners.
4. Outdoor storage is detrimental to the existing and future businesses in the area and is not harmonious with the goals of the city.[17]

Most city officials reading these findings would probably consider them typical of the type of conclusions commonly cited to support local land use decisions. The trial court deemed them adequate to legally support the denial, but the Court of Appeals disagreed.

The standard for reviewing administrative decisions in Utah is that they will only be upheld if they are supported by *"substantial evidence in the record."* This does not mean that all the evidence presented to the decision-makers must support the decision or even a preponderance of the evidence must be found in favor. All that is required is that the local decision-makers provide some credible, factual

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

basis for their decisions and include it in the record of the proceedings. West Jordan did not do this in the Wadsworth matter.

The city had argued that the findings listed above were adequate in light of the "great deal of deference" owed to local decisions. The court held, however, that "there is a significant distinction in the degree of deference owed a municipality's land use decision depending on whether it is made while the decision-making body is acting in a legislative capacity or an administrative/adjudicative capacity."[18] The court used strong language in reminding local officials that they must do more than just speculate on the impact of proposed land uses:

> In denying [Wadsworth's] application, the city council relied on its finding that "[t]he city has made a significant investment in bringing Dannon to the area and . . . [o]utdoor storage is detrimental to the area . . . and injurious to the goals of the city." However, the only evidence in the record supporting this finding is the concerns expressed by neighboring landowners. The record does not reveal whether the commission's staff actually investigated the concerns raised at the public hearing or why they concluded that outdoor storage on [Wadsworth's] property—which is located in an M-1 zone—would be adverse to the city's goals.[19]

This is the Wadsworth construction yard. The Utah Court of Appeals held that, absent substantial evidence to the contrary, the provisions of the West Jordan Zoning Ordinance permitting outdoor storage as a conditional use must be applied to allow such a use in this industrial zone.

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

In other words, the city had already covered the issue of compatibility when it provided by ordinance that outdoor storage could be allowed as a conditional use in the zone. That legislative decision to define appropriate uses in the zone would have been given great deference if the neighbors had challenged the legislative act of allowing storage use in the M-1 zone when the zoning ordinance was adopted or amended. *Having made that policy decision in legislative process, however, the city could not ignore its own conclusions as expressed in the ordinance.* How could the city state in an ordinance that open storage is appropriate and desirable if properly conditioned but then deny an application for storage with broad language saying that such uses were incompatible?

The city's inconsistency was too obvious for the court's taste and it went on to add:

> Similarly, the sole evidence supporting the city council's determination that [Wadsworth's] outdoor storage "may be considered a nuisance" is the concern raised by neighboring property owners regarding potential increases in "rodent traffic" and dust. Although [the zoning ordinance] authorized the city council to deny [Wadsworth's] application if it was "deemed . . . a nuisance," the city council did not find that [Wadsworth's] storage would actually constitute a nuisance. Thus, this finding was also insufficient to justify denial of [the] conditional use application.[20] (emphasis added)

Noting that there are other landowners in the area with outdoor storage, the court simply could not understand where the evidence existed that would show how outdoor storage on Wadsworth's lot would be detrimental to other landowners who also have outdoor storage on their lots. In the context of administrative decisions, the lack of evidence supporting a denial is fatal to the decision if appealed to court.

Administrative decisions include the following, referred to in state code as "land use decisions"[21]:

- Subdivision approvals.
- Review of variance requests.
- Decisions interpreting the meaning of the ordinances.

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

- Appeals from decisions of zoning officials.
- Issuing and enforcing building permits.
- Regulation of nonconforming (grandfathered) uses.
- Any other decision that is not made by the city or town council or county council or commission. If a final land use decision is not made by the legislative body, it *must* be administrative and *cannot* be legislative.

Note that in the *Wadsworth* case, the administrative decision maker was the city council. As already stated above, just because the legislative body is making the decision does not mean that the decision is legislative. Local elected boards, councils, and commissions often act in administrative capacities when they make land use decisions.

In the alternative, if the decision maker is not the council or county commission, then the land use decision being made cannot be a legislative decision. The judgment calls made by the board of adjustment, zoning administrator, appeal authority, building inspector, and staff are always administrative or quasi-judicial and must therefore always be supported by substantial evidence when challenged.

While the planning commission may make a recommendation on a proposed change to the general plan, land use ordinances, or zoning map, its advice is not defined as a "land use decision" but is instead a recommendation to the elected officials who must make each and every final legislative decision.

Those who master this principle will have covered a lot of ground in understanding local land use procedures. It may seem somewhat clear, but it must be remembered that the trial court in *Wadsworth* agreed with West Jordan, and it took the Court of Appeals to clear up the confusion about what constitutes substantial evidence. Do not be discouraged if a local decision seems marginal and the appeal unpredictable. Even the judges do not agree on some cases, and there are few bright lines in this business.

Summary of the Esential, Fundamental Law

Legislative Acts vs. Administrative Acts

What we have covered in this chapter is so essential to one's understanding of the basics of land use law that it is summarized again:

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

Legislative decisions will be upheld if (1) it is reasonably debatable that they advance the purposes of land use regulation which are outlined in the Land Use, Development, and Management Acts and (2) they do not otherwise violate federal, state, or local statutes, laws, or ordinances.[22]

Administrative decisions will be upheld if (1) they are supported by substantial evidence in the record of the decision and (2) do not violate federal, state, or local statutes, laws, or ordinances.[23]

Substantial evidence is more than a mere "scintilla" of evidence though something less than the weight of the evidence. It is defined in state law as evidence that (1) is beyond a scintilla and (2) a reasonable mind would accept as adequate to support a conclusion.[24]

Public clamor is not substantial evidence. An administrative decision cannot be based primarily on citizen comments at a public hearing, petitions, or social media campaigns. To constitute substantial evidence, opinions in the record should be from those with particular expertise on the subject matter which they address. For example, a real estate appraiser could comment on whether a given decision might affect the property value of nearby property, but the average citizen's opinion about property values would not constitute substantial evidence. While the public's right to speak at a hearing is protected, only the comments which meet the definition of substantial evidence gathered in the hearing process can be considered by the board, commission, or hearing officer when making the decision.

The record of a decision includes all the documents that were before the decision-maker when the decision was made, any recordings of meetings and hearings held about the matter, and the official minutes of a board or commission. In order to survive a challenge, the record of an administrative issue must include the basis for the decision so that the local appeal authority or a district court judge can understand the facts and law which were relied upon by the decision maker.[25] Clearly stated findings of fact and conclusions of law must be part of the record.

The law that governs a land use decision may be found in the local ordinance or in state or federal statutes or appellate court opinions. A city, town or county must follow its own ordinances. State law prevails if there are provisions that conflict with the local land use regulations. Decisions by the Utah Supreme Court and Court of

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

Appeals interpreting state and local statutes and ordinances and the constitutions of the State of Utah and the United States also prevail over local ordinance.

Interpretation of the relevant statutes and ordinances is needed to determine if an action is illegal. According to guidelines set forth in court opinions, a code or statute is to be interpreted.

1. Our primary goal is to evince the true intent and purpose of the Legislature (including the city council or county commission).[26]
2. The best evidence of the legislature's intent is the plain language of the statute itself.
3. We presume that the legislature was deliberate in its choice of words and used each term advisedly and in accordance with its ordinary meaning.
4. Where a statute's language is unambiguous and provides a workable result, we need not resort to other interpretive tools, and our analysis ends.
5. However, our plain language analysis is not so limited that we only inquire into individual words and subsections in isolation.
6. Our interpretation of a statute requires that each part or section be construed in connection with every other part or section so as to produce a harmonious whole.
7. When interpreting statutory text, we presume that the expression of one term should be interpreted as the exclusion of another.
8. We will not infer substantive terms into the text that are not already there.
9. We assume, absent a contrary indication, that the legislature used each term advisedly, and
10. [We] seek to give effect to omissions in statutory language by presuming all omissions to be purposeful."[27]

---

1 While there are some distinctions between administrative decisions such as approving a subdivision application and quasi-judicial decisions, such as resolving a land use appeal, both types of decisions are reviewed in the same manner by the district court. For our purposes, both are treated here as administrative decisions.

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

2 *Bradley v. Payson City Corp.,* 2001 UT App 9, 17 P.3d 1160 (Utah App 2001), vacated 2003 UT 16,70 P.3d 47 (Utah 2003); *Harmon City, Inc. v. Draper City,* 2000 UT App 31, 997 P.2d 321 (Utah App 2000); *Wadsworth Construction v. West Jordan,* 2000 UT App 49, 999 P.2d 1240 (Utah App 2000).

3 *Bradley, supra,* note 1; Utah Code Ann. §10-9a-801(3)(b) (municipalities); Utah Code Ann. §17-27a-801(3)(b) (counties).

4 *Bradley, supra,* note 1; Utah Code Ann. §10-9a-801(3)(c) (municipalities); Utah Code Ann. §17-27a-801(3)(c) (counties).

5 This is the general rule. At times, there can be a dispute over whether an action by a legislative body is administrative or legislative. The finer details are beyond the scope of this analysis, but a handful of appellate decisions lay out the criteria for resolving a close call. When in doubt, the courts have sometimes looked to how the local government characterizes its own role to inform their analysis. *Suarez v. Grand Cty.,* 2012 UT 72, ¶ 42, 296 P.3d 688, 699. The approval of a large project with multiple land uses involved broad policy considerations that were deemed legislative in nature. A development agreement, however, was ruled administrative in nature. *Baker v. Carlson*, 2018 UT 59. See discussion in Chapter 17 – Citizen Initiatives and Referenda.

6 *Harmon City., supra*, note 1. [5]Id. ¶ 28. (emphasis added). [6]Id. ¶ 18.

7 Id. ¶ 28.

8 Id. ¶ 18.

9 Id. ¶ 27, quoting *Gayland v. Salt Lake County*, 358 P.2d 633, 634 (1961). (emphasis in original).

10 See *Patterson v. American Fork City*, 2003 UT 7, generally, for a discussion of constitutional challenges to land use decisions.

11 *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388–89 (1926).

12 Utah Code Ann. §10-9a-103(33) (municipalities); Utah Code Ann. §17-27a-103(37) (counties).

13 2000 UT App 49, 999 P.2d 1240. (Utah App. 2000).

14 Cited by the Court of Appeals as West Jordan, Utah, ordinance §10-9-102(f) (1991).

15 Utah Code Ann. §10-9a-507 (municipalities); Utah Code Ann. §17-27a-506 (counties).

16 *Wadsworth*, supra, note 1 ¶3.

17 *Wadsworth*, supra, note 1 ¶15.

18 *Wadsworth*, supra, note 1 ¶16, quoting *Harmon City supra*, note 9, ¶8.

19 *Wadsworth*, supra, note 1 ¶17.

20 *Wadsworth*, supra, note 1 ¶18.

21 Utah Code Ann. §10-9a-103(31) (municipalities); Utah Code Ann. §17-27a-103(35) (counties).

22 Utah Code Ann. §10-9a-801(3)(a) (municipalities); Utah Code Ann. §17-27a-801(3)(a) (counties).

23 Utah Code Ann. §10-9a-801(3)(b) (municipalities); Utah Code Ann. §17-27a-801(3)(b) (counties).

24 Utah Code Ann. §10-9a-103(67) (municipalities); Utah Code Ann. §17-27a-103(72) (counties).

25 *McElhaney v. City of Moab*, 2017 UT 65, ¶ 39, 423 P.3d 1284, 1293.

26 *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863, 866

27 *2 Ton Plumbing LLC v. Thorgaard*, 2015 UT 29; 345 P.3rd 675, ¶¶ 31-32. (The text of the opinion has been reformatted here as a numbered list for clarity but has otherwise not been changed.

Copyright ©2021 Utah Land Use Institute – All Rights Reserved

Copyright ©2021 Utah Land Use Institute – All Rights Reserved